93-65

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

RICHARD PATRICK LONG, Petitioner,

v.

STATE OF ALABAMA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the opinion below and the plurality opinion in Hampton v. United States, 425 U.S. 484 (1976) improperly expand United States v. Russell, 411 U.S. 423 (1973) to exclude from application of the fundamental fairness defense predisposed defendants and defendants who have suffered no independent constitutional deprivation.

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RICHARD PATRICK LONG,

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v.

STATE OF ALABAMA,

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

Petitioner, Richard Patrick Long, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The unreported decision of the Supreme Court of Alabama denying Petitioner's petition for a writ of certiorari to the Alabama Court of Criminal Appeals was entered on March 19, 1993. (Appendix A). The unreported opinion

of the Alabama Court of Criminal Appeals was entered on November 18, 1992. (Appendix B). The Alabama Court of Criminal Appeals overruled Petitioner's application for rehearing on January 22, 1993. (Appendix C).

JURISDICTION

Final judgment in this matter was entered on March 19, 1993. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves:

The Fifth Amendment to the United States Constitution which provides in pertinent part: "No person shall be ... deprived of life, liberty or property, without due process of law..."

The Fourteenth Amendment to the United States Constitution which provides in pertinent part: "No state shall .. deprive any person of life, liberty or property without due process of law."

Section 13A-12-231, Code of Alabama, which

provides in pertinent part:

"Except as authorized in chapter 2, title 20: ...

"(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of one kilo or 2.2 pounds of cannabis is guilty of a felony, which shall be known as 'trafficking in cannabis.' If the quantity of cannabis involved:

"a. Is in excess of one kilo or 2.2 pounds, but less than 100 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $25,000.00. ...

"b. Is 100 pounds or more, but less than 500 pounds, such person shall be sentenced to a mandatory minimum term of imprisonment of five calendar years and to pay a fine of $50,000.00. ...

"(2) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of 28 grams or more of cocaine or of any mixture containing cocaine, described in section 20-2-25(1), is guilty of a felony, which shall be known as 'trafficking in cocaine.' If the quantity of involved:

"a. Is 28 grams or more, but less than 500 grams, such person shall be sentenced to a mandatory minimum term of imprisonment of three calendar years and to pay a fine of $50,000.00...."

Section 36-25-5, Code of Alabama which provides in pertinent part:

> "(a) No public official or employee shall use an official position to obtain direct personal financial gain for himself, his family, or any business with which he or a member of his family is associated unless such use or gain are specifically authorized by law...."

Section 36-25-27, Code of Alabama which provides in pertinent part:

> (a)(1) Any person subject to this chapter who knowingly or willfully violates any provisions of this chapter other than the requirements of financial and lobbying disclosure shall be found guilty of a felony and shall be fined not more than $10,000.00 or less than $2,001.00, or shall be imprisoned for not more than 10 years but not less than two years or any combination thereof...."

STATEMENT OF THE CASE

Petitioner Richard Patrick Long convicted in the Circuit Court of Montgomery County, Alabama for trafficking in marijuana, in violation of Section 13A-12-231(1)(a) & (b), trafficking in cocaine, in violation of Section 13A-12-231(2)(a), and using his public office for personal gain, in violation of

Section 36-25-5, Code of Alabama. On November 21, 1991, Long was sentenced to 10 years' imprisonment in each of the marijuana and cocaine cases and to 5 years' imprisonment in the ethics case.

The trial record indicates the following:

Montgomery, Alabama police officer Richard Patrick Long and and his wife, Lynn Long, had been married only a few years. (RT 569). They had two young children. The medical expenses in connection with the birth of their first child had not been covered by insurance. After their second child was born, Lynn Long quit her employment outside the home because the child care expenses were offsetting her employment income. (RT 571). They rented a town house after they got married but had trouble paying the rent. They later moved into a house owned by her parents and stayed there until her father decided to sell the house and gave them only 30 days to move. Their car had been damaged in a collision with

an uninsured motorist. Their only other vehicle wan an undependable truck. During this time period, Richard and Lynn Long discussed his retiring from the Montgomery police department, withdrawing his retirement, and making a down payment on a house. Long worked a number of part time jobs and volunteered for extra detail with the police department. (RT 575-578, RT 612). It is against his backdrop, that the stage in this case was set.

Lester Shane Stokes was twenty-four years old and was suspected, if not known, by agents of the Alabama Department of Public Safety (D.P.S.), to have been involved with drug activities. (RT 473). D.P.S. agent T.L. Coleman arranged for Stokes to be debriefed by the United States Drug Enforcement Agency (D.E.A.) during February of 1991 about cocaine business in Montgomery. (RT 96, 97).

Stokes denied ever dealing drugs and claimed the last time he used drugs was

October, 1989. However, two witnesses related that Stokes had tried to get them involved in distributing cocaine in 1990. (RT 536-537, 727-729).

Stokes did admit to using drugs beginning with the period following his senior year in high school and regularly for several years following that. (RT 29-131). Stokes had been acquaintances with Richard Long since junior high school. Stokes said he learned Long was a police officer in 1988. (RT 28). Stokes claimed that about two to two and a half years before, he and Long had shared cocaine at a party. Furthermore, according to Stokes, Long had expressed an interest in working in the drug business. Stokes said he did not follow up because Long's employment as a police officer made him leery. (RT 146-148). Long denied this. (RT 600).

Stokes did not see Long again until April 18, 1991, when he saw Long at a Montgomery bank where Stokes did business and where Long

worked as a part-time job as a security guard. (RT 148, 600-601). Stokes said Long told him he needed some money and referenced their previous conversation. Stokes said they exchanged beeper numbers and that he left. Long testified that when he saw Stokes come into the bank, he spoke to him and engaged in some small talk with him. Long said Stokes then motioned him outside and asked him how much he made at the bank. Long said he told Stokes he made $48.00 for four hours work and that Stokes told him he could make $500.00 per week working for him. Long said he asked what he meant and that Stokes gave him his beeper number and told him to give him a call the following Monday evening. (RT 604).

Stokes notified Coleman, (RT 154, 155), and the following Monday evening, April 22, 1991, met with Coleman and D.P.S. agent Cliff McLeod at Coleman's residence. McLeod directed Stokes to set up a meeting with Long. (RT 440-441). They determined that the proposal

would be for Long to provide protection for transportation of drugs. (RT 442). During this meeting, Stokes received the page from Long per his previous instructions. (RT 122-123). Coleman activated a recorder on the telephone and Stokes returned Long's page. There was no specific mention of drugs in the conversation. (RT 114). Long denied any agreement to carry out a drug deal during the telephone conference.

The next day, Stokes, after conferring with his handlers, met Long at a local bank. (RT 158, 159, RT 648-650). Stokes and Long rode around in Stokes' car. According to Stokes they discussed Long's assisting in a drug operation by riding shotgun on trips and, if stopped by law enforcement officials, flashing his badge "to take the heat off." (RT 160). According to Stokes, Long was to be paid $250.00 for this service. (RT 159, 160). Long said that Stokes told him he had wanted him to ride with a friend who had been getting

traffic tickets and flash his badge if his friend were stopped for a traffic violation. According to Long, Stokes told him that this friend had problems getting insurance and could not afford to get any more tickets. Long said Stokes told him he would be paid $250.00 for such a service. (RT 646). Stokes reported the meeting to Officer McLeod the next day.

Thereafter, Stokes engaged Long in a number of telephone calls, most of which were recorded.

In two preliminary telephone conferences, Long specifically mentioned his need for money. Stokes said that on May 6, 1991, Long contacted him at home about his need for money. (This telephone conference was not recorded but Stokes said he briefed McLeod about it.) (RT 165). In a May 7, 1991 phone conference, Long told Stokes of his need of money to put down on a house because of he was having to move and of his consideration of

quitting the police department for the purpose of drawing his retirement and re-applying for employment with the police department later. (RT 610-610).

On the morning of May 8, 1991, Stokes contacted Long and directed him to meet them at a local bank. (RT 652, 653). Long again mentioned his need for money. (RT 254, 256). Stokes met with Long and D.P.S. undercover agent Norman Willingham at the bank. Willingham was introduced to Long as "Larry." Stokes gave Willingham an envelope supposedly containing money for the purchase of marijuana in Mobile. Stokes paid Long with money given to him by McLeod for the trip and instructed Long to call him upon his return from Mobile. (RT 293, 294, 312). Long said that there was not any talk about drug activity at the bank. (RT 607). On the way to Mobile, Willingham engaged Long in a conversation about the drug business and the money to be made in the drug business. (RT 310, 311). Long testified that

he was told they were going to get marijuana after they were already on the road. Long said he did not realize that and was shocked and afraid for his life. (RT 614-616, 656). In Mobile, Willingham stopped in the parking lot of an unmarked DEA building and met with Mobile County Deputy Sheriff John Pigot, who posed as a drug courier. Willingham spoke to Pigot at the rear of the car. Pigot got the envelope from Willingham and transferred a bail of marijuana obtained from DEA inventory to the trunk of Willingham's car. (RT 295, 296, 407-410). Long stayed in the car during this exchange. (RT 298). Long said that after Willingham got back into the car, he told him he had got forty pounds of marijuana. Long said that on the way back to Montgomery, Willingham told him about a desire for more investors and led him to believe that getting into the drug business could solve his financial problems. (RT 618-621, 660). Once back in Montgomery, Willingham dropped Long

off at the bank and told him they could do it again. (RT 300, 315).

On May 17, 1991, Stokes contacted Long by telephone to let him know where to meet for a second drug transport trip. Willingham, after conferring with McLeod, went to the bank to pick up Long. Duffel bags full of exposed marijuana were already in the vehicle for the purpose of making Long touch and handle the contraband. (RT 301, 302, 320). Willingham instructed Long to place the marijuana back in the duffel bags. (RT 370). As on the previous trip to Mobile, the drop off point was an unmarked DEA office building. When they arrived, Long got out and helped transfer one of the duffle bags of marijuana to a car driven by D.P.S. undercover agent William Batson. Batson paid Long $250.00.[1] (RT 323-325, 415-419). Upon return to Montgomery,

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[1] McLeod had instructed Batson to pay Long because Stokes had not shown up for a pre-trip meeting. (RT 452-455).

Long was dropped off at the bank. (RT 329).

On May 30, 1991, Stokes and Long conferred by telephone about a third drug transport trip. Willingham met Long at the bank. (RT 230-333). On the way to Birmingham, Willingham told Long the man they were to meet in Birmingham could sell any drugs Long could provide. (RT 334, 335). Willingham also told Long that he was vacationing in Key West the next week and would be calling Long to see if he were interested in moving more drugs. (RT 336). Long said that Stokes and Willingham tried to get him to involve another police officer. Long said he did not want to do that and put them off. (RT 624-625). In Birmingham, they went to the same unmarked DEA office building. This time D.P.S. undercover agent Guy Warren acted as the drug courier. Willingham opened the trunk of his car and showed a bag of cocaine to Warren. Warren took the bag of cocaine and put it in the front seat of his car. At Willingham's

request, Long got out of the car and helped transfer a duffle bag of marijuana to Warren's car. (RT 337, 338). Warren transferred the other duffle bag of marijuana to the trunk of his car. Warren and Willingham discussed future transport of cocaine. (RT 422-426). On the return trip, Willingham again told Long he needed additional investors, (RT 624-626), and Long told Willingham he intended to cease his involvement with drug trafficking. Upon returning to Montgomery, Willingham again let Long out at the bank.

About a week later, Willingham at the instruction of McLeod, called Long from the Florida Keys. Willingham asked Long if he had been successful in locating anybody interested in purchasing more drugs. (RT 343, 344, 389, 390).

During this time period when Stokes was working as informant for law enforcement he was being paid expense money. He denied being paid money for information given, but the

compensation represented lost time from work and school. He was also paid $250.00 for each trip he facilitated. (RT 250-252). To the best of his knowledge, Stokes was probably paid $1,500.00. (RT 186).

On appeal, Petitioner argued that the law enforcement officials' conduct was so outrageous as a matter of law to amount to a denial of due process. In affirming, the Alabama Court of Criminal Appeals did recognize the fundamental fairness defense. The Court of Criminal Appeals said of this Court's decisions in Russell, 411 U.S. 423 (1973) and Hampton v. United Staes, 425 U.S. 484 (1976): "[W]hile the United States Supreme Court has neither endorsed nor completely foreclosed such a defense, see United States v. Russell, 411 U.S. 423, 432 (1976); Hampton v. United States, 425 U.S. 484 (1976), that Court has chosen to base its decisions on entrapment instead. See Russell." It based its rejection of Petitioner's fundamental

fairness argument upon a finding of predisposition stating:

> "The appellant has simply not shown that the conduct of law enforcement officers in the instant case was 'fundamentally unfair' or 'shocking to the universal sense of conscience.' The evidence supports a finding that the appellant repeatedly solicited drug courier work from Shane Stokes. The law enforcement authorities involved merely provided the vehicle by which he could commit the offense that he had indicated he was predisposed to commit."

The Alabama Court of Criminal Appeals overruled Petitioner's timely filed applicaiton for rehearing. The Supreme Court of Alabama denied Petitioner's timely filed petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The opinion below and the plurality opinion in Hampton v. United States, 425 U.S. 484 U.S. (1976) improperly expand United States v. Russell, 411 U.S. 423 (1973) to exclude from application of the fundamental fairness defense predisposed defendants and defendants who have suffered no independent constitutional deprivation.

A fundamental fairness defense separate and distinct from an entrapment defense was

recognized by this Court in United States v. Russell, 411 U.S. 423, 431 (1973). In Russell, this Court though refusing relief on such a claim in the case before it, stated:

> "While we may some day be presented with s situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction, ... the instant case is distinctly not of that breed. ...The law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice,' mandated by the Due Process Clause of the Fifth Amendment."

411 U.S. at 431-432. The majority noted in its opinion "the difficulties attending the notion that due process of law can be embodied in fixed rules." Russell, 411 U.S. at 431.

The fundamental fairness defense was again before this Court in Hampton v. United States, 425 U.S. 484 (1976). In Hampton, this Court again rejected a fundamental fairness defense argument. A three member plurality concluded:

> "[In Russell] we ruled out the possibility that the defense of entrapment could ever be based upon

> governmental misconduct in a case, such as this one, where the predisposition of the defendant to commit the crime was established.
>
> ...
>
> "The remedy of the criminal defendant with respect to acts of Government agents, which, far from being resisted, are encouraged by him, lies solely in the defense of entrapment."

Hampton, 425 U.S. at 490, 491 (plurality opinion). The plurality went on to state: "The limitations of the Due Process Clause of the Fifth Amendment come into play only when the Government activity violates some protected right of the defendant." Hampton, 425 U.S. at 490 (plurality opinion).

In a separate opinion concurring in the judgment, Justice Powell, joined by Justice Blackmun, described the plurality opinion as having enunciated a per se rule, stating: "The plurality thus says that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of police behavior in light of the

surrounding circumstances." Hampton, 425 U.S. at 492 (Powell, J., concurring). Justice Powell opined that Russell had not reached as far as portrayed in the plurality opinion. Hampton, 425 U.S. at 492-495 (Powell, J., concurring). He concluded:

> "I am therefore unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case in which the Government is able to prove disposition."

Hampton, 425 U.S. at 495 (Powell, J., concurring).

Here, the Alabama Court of Criminal Appeals did recognize the fundamental fairness defense. The Court of Criminal Appeals said of this Court's decisions in Russell and Hampton: "[W]hile the United States Supreme Court has neither endorsed nor completely foreclosed such a defense, see United States v. Russell, 425 U.S. 423, 432 (1976); Hampton v. United States, 425 U.S. 484 (1976), that Court has chosen to base its decisions on

entrapment instead. See Russell." It clearly based its rejection of Petitioner's fundamental fairness argument upon a finding of predisposition stating:

> "The appellant has simply not shown that the conduct of law enforcement officers in the instant case was 'fundamentally unfair' or 'shocking to the universal sense of conscience.' The evidence supports a finding that the appellant repeatedly solicited drug courier work from Shane Stokes. The law enforcement authorities involved merely provided the vehicle by which he could commit the offense that he had indicated he was predisposed to commit."

This rationale appears to be in line with the portion of the plurality opinion in Hampton to the effect that a predisposed defendant may not avail himself of the fundamental fairness defense. Petitioner submits that the majority opinion in Russell is not so restricted as to bar application of the defense "in any case in which the Government is able to prove disposition." Hampton, 425 U.S. at 492 (Powell, J.,

concurring).[2] Petitioner submits that placement of such a restriction on the defense ignores the recognized "difficulties attending the notion that due process of law can be embodied in fixed rules." Russell, 411 U.S. at 431. Here, the placement of such a restriction upon the analysis of Petitioner's fundamental fairness claim did not comport with the majority opinion in Russell. Analysis of his claim without such a restriction would lead to a conclusion that the conduct of law enforcement agents in this case was so outrageous that due process principles barred his convictions.

This Court should grant certiorari to resolve the confusion, if not conflict, arising from the differences between the majority opinion in Russell and the plurality

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[2] Petitioner likewise submits that Russell did not reach so far as to limit application of the fundamental fairness defense to situations involving some independent "protected right of the defendant."

opinion in Hampton.

CONCLUSION

For the foregoing reasons, Petitioner Richard Patrick Long requests this Court to grant his Petition for Writ of certiorari to the Supreme Court of Alabama.

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Appendix A

IN THE SUPREME COURT OF ALABAMA

March 19, 1993

1920660

Ex parte Richard Patrick Long. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Richard Patrick Long v. State) (91-371)(Montgomery: CC-91-1582 thru 1586)

CERTIFICATE OF JUDGMENT
Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

COSTS TAXED TO PETITIONER.

MADDOX, J. - HORNSBY, CJ., SHORES, HOUSTON, & KENNEDY, JJ., CONCUR.

Appendix B

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1992-93

CR-91-371

Richard Patrick Long

v.

State

Appeal from Montgomery Circuit Court

(CC-91-1582 through -1586)

PATTERSON, PRESIDING JUDGE

The appellant, Richard Patrick Long, was convicted after a jury trial of trafficking in marijuana (CC-91-1582, -1583, and -1585), in violation of [Section] 13A-12-231(1)(a) & (b), trafficking in cocaine (CC-91-1586), in violation of [Section] 13A-12-231(2)(a), and using his public office for personal gain (CC-91-1584), in violation of [Section] 36-25-5, Code of Alabama 1975. He was sentenced to 10 years' imprisonment in each of the marijuana

and cocaine trafficking cases and to 5 years' imprisonment in the ethics case, with all sentences to run concurrently. He raises six issues on appeal.

I

The appellant argues that the trial court erred by ruling that he failed to prove a prima facie case of discrimination pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), and by not requiring the state to provide reasons for its strikes. The record reflects that the venire was composed of 23 whites and 9 black venirepersons. The state exercised 5 of its ten strikes to remove blacks. The jury was composed of 9 whites and 3 blacks. One white and one black served as alternates. Thus, blacks represented 28% of the venirepersons and 25% of the jurors.

The appellant contends that the standard of review for a Batson claim is whether the trial court abused it discretion. He is incorrect -- the proper standard of review is whether the

trial court's ruling was clearly erroneous. Ex parte Branch, 526 So.2d 609, 625-26 (Ala. 1987). The appellant argues that because the state removed 55.5% of the blacks and only 21.7% of the whites from the venire, he proved a prima facie case of discrimination. This contention is without merit because the percentage of venirepersons struck will usually be lower when the state exercises strikes against the majority race of the venirepersons than against the minority race of the venirepersons. Batson simply does not dictate that the state exercise its strikes of venirepersons in percentages based on the percentage of the venire of venirepersons of a particular race. The appellant also contends that the state did not engage in any meaningful voir dire. However, he did not make this argument at trial; therefore, we will not consider the issue on appeal. Rika v. State, 587 So.2d 1054 (Ala. Cr. App. 1991).

The Alabama Supreme Court has held: "When

the evidence shows only blacks were struck and that a greater percentage of blacks sat on the jury than on the lawfully established venire, an inference of discrimination has not been created." Harrell v. State, 571 So. 2d 1270, 1271 (Ala. 1990), cert. denied, 111 S.Ct. 1641 (1991). This holding may be logically extended in cases such as this one, in which the percentage of blacks on the venire and on the jury is only slightly different -- in this case, only 3%. The racial composition of the jury roughly mirrored the racial composition of the venire; therefore, we cannot say that the trail court's ruling was clearly erroneous.

II

The appellant argues that the trial court abused its discretion by admitting evidence of his alleged past use of cocaine. The state offered, over objection, testimony of Shane Stokes, the informant in this case, to the effort [sic] that the appellant used cocaine

with him on an occasion two and one-half years before the instant offenses. The trial court ruled that the evidence was admissible as evidence of a predisposition to commit the offense to rebut the appellant's defense of entrapment.

As a general rule, evidence of collateral offenses is inadmissible. C. Gamble, McElroy's Alabama Evidence [Section] 60.01(1)(4th ed. 1991). This rule, however, is subject to exceptions. See McElroy's [Sections] 69.01(2)-(14). "[I]f there is a close question of whether [a] prior crime falls into one of these exceptions, then admissibility is, to some extent, within the discretion of the trial court." Id. at [Section] 60.02(1) (footnote omitted).

As previously noted, the appellant offered the defense of entrapment.

> "Special pleas and defenses are available which, when asserted by the accused, place all or a limited portion of his character in issue. The materiality of his character permits the prosecution to

> introduce any other criminal acts which are relevant to prove it. A major illustration of this principle is found in criminal prosecutions where the accused invokes the defense of entrapment. The use of such a defense has been held to place in issue the defendant's predisposition to commit the charged crime. This permits the prosecution to offer prior crimes by the accused to rebut such a special defense. By having pleaded the defense of entrapment, the accused has been held to have placed in issue his predisposition, or lack thereof, to commit the crime and evidence of collateral crimes is admissible to rebut such a defense and to illustrate, at the time of the commission of the offense, the accused's intent."

Id. at [Section] 69.01(13)(footnotes omitted). This exception may be used to admit evidence of other instances of the unlawful distribution of illegal drugs when a defendant pleads entrapment in an unlawful distribution or trafficking case. See, e.g., Brown v. State, 392 So. 2d 1248 (Ala. Cr. App. 1980), writ denied, 392 So.2d 1266 (Ala. 1991). However, we find no Alabama cases in which evidence of alleged drug use has been admitted to rebut a defense of entrapment in a prosecution for trafficking.

The North Carolina Court of Appeals, in State v. Goldman, 97 N.C. App. 589, 389 S.E.2d 281 (199), review denied, 327 N.C. 434, 395 S.E.2d 691 (1990), held that evidence of an appellant's previous cocaine and lysergic acid diethylamide (LSD) use was admissible in a prosecution for "possessing [LSD] and cocaine with intent to sell and deliver, selling and delivering LSD and cocaine and trafficking LSD."[1] 97 N.C. App. at 591; 389 S.E.2d at 282. In reaching its decision, the Goldman court stated the following:

> "G.S. sec 8C-1, Rule 404(b) provides that evidence of other wrongs is admissible to prove the absence of entrapment. We view personal use of drugs as not being synonymous with the intent to sell, distribute or traffic drugs. However, we find no error with the trial court's decision to admit evidence of defendant's prior drug use to show his predisposition to commit the crimes charged."

97 N.C. App. at 595; 389 S.E.2d at 284.

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[1] The Goldman court also allowed testimony regarding the appellant's drug possession and marijuana use to establish the lack of entrapment. See Goldman, 97 N.C. App. at 593; 389 S.E.2d at 283.

Compare N.C. Gen. Stat. [Section] 88C-1, Rule 404(b) (1986) with McElroy's at [Section] 69.01(1)-(13).[2] We find Goldman applicable to the instant case and hold that testimony regarding the appellant's alleged previous cocaine use admissible to show his predisposition to commit the offense of trafficking marijuana and cocaine.

The appellant also argues that the alleged previous cocaine use was too remote from the instant offenses to be admissible. The determination of whether a collateral offense is too remote is a matter within the trial

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[2] N.C. Gen. Stat [Section] 8C-1, Rule 404(b) (1986) reads as follows:

> "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence or mistakes, entrapment or accident." (Emphasis added.)

court's discretion. McElroy's at [Section] 69.02(6). We conclude that two and one-half years is not too remote; therefore, the trial court did not abuse its discretion by admitting evidence of the appellant's alleged prior cocaine use.

III

The appellant argues that the trial court erred by limiting his cross-examination of Shane Stokes concerning threats allegedly made by the appellant against him. At trial, on redirect examination of Shane Stokes, the following occurred:

"Q [Prosecutor] You were asked questions -- First of all, about this execution stuff that they asked you about, did you ever tell anybody or mention anything about somebody talking to you about somebody being executed?

"A [Stokes] I told T.L. Payne [investigator] when he started bringing up the name of my fiancee that I did not appreciate it because my uncle, who was a deputy sheriff, and lived in South Florida and is now residing in Mississippi, had told me what happens many times to the family and to people who inform themselves; and I've already received mail threats in this case from

Mr. Long's friends.

> "MR. HAWTHORNE [Defense counsel]: Your Honor, I'm going to object and move to exclude that. There is absolutely no evidence as to that. I am going to ask for a mistrial.
>
> "MR.GRADDICK [Prosecutor]: He brought it up.
>
> "THE COURT: Overruled."

On recross-examination, the appellant sought the names of those who allegedly threatened Stokes. He then sought the identity of the person who had relayed the information to Stokes that threats had been made. The state objected and contended that this informant should remain anonymous because the district attorney's office was conducting an ongoing investigation. The trial court allowed the appellant to ask who had threatened Stokes, but not who had relayed the information concerning the threats to him, and repeatedly refused to allow the appellant to cross-examine Stokes regarding the informant's

identity.

> "It is well recognized that the prosecution has the privilege to withhold the identification or production of persons who furnish information to law enforcement officers. See Roviaro v. United States, 353 U.S. 53 ... (1957. See generally United States v. Herrero, 893 F.2d 1512, 1525 (7th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 2623 ... (1990). However, this privilege is not absolute. 'Where the disclosure of an informer's identification, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.' Roviaro, 353 U.S. at 60-61 ... (emphasis added [in Berry)." ...
>
> "While the prosecution's privilege to withhold an informant's identity may be defeated, 'the burden is on the defendant to demonstrate the need for the disclosure.' United States v. Fixen, 780 F.2d 1434, 1439 (9th Cir. 1986), quoted in Lightfoot v. State, 531 So.2d 57, 59 (Ala. Cr. App. 1988).

Berry v. State, 581 So.2d 1269, 1273 (Ala. Cr. App. 1991). Furthermore, the scope of cross-examination, whether on matters relevant or irrelevant, rests with the trial court and its exercise of its discretion will not be disturbed absent "extreme cases of abuse," Beavers v. State, 565 So.2d 688, 689 (Ala. Cr.

App. 1990).

The appellant contends that the allegation of threats by him were prejudicial and that the trial court's limiting his cross-examination impeded his ability to test Stokes's veracity regarding this information, and that therefore, he should have been allowed to elicit the name of the informant. This issue, however, is without merit. First, the appellant did not adequately demonstrate the need for determining the informant's identity. The appellant testified, and he could have refuted Stokes's testimony that he had threatened him, but he did not. Furthermore, Stokes identified the other individuals who allegedly threatened him, both of whom were present at trial and one of whom testified. The appellant could have had both these individuals testify and refute Stokes's statement or he could have possibly determined through these witnesses who the informant was. Second, the threats were, at best, a

peripheral issue, and the trial court did not abuse its discretion by disallowing the evidence. Thus this issue is without merit.

IV

The appellant argues that the trial court erred by denying his motion for a judgment of acquittal and motion for new trial because the state failed to prove a prima facie case of trafficking in marijuana and trafficking in cocaine. At trial, the state's evidence tended to show the following facts: The state's informant, Shane Stokes knew the appellant in high school. Stokes had seen the appellant at a party some two and one-half years before the offenses alleged in the instant case and shared some cocaine with him. At the time, the appellant offered to be a "mule" or drug courier for Stokes. Stokes told the appellant that he did not need a "mule." Stokes knew that the appellant was an officer with the Montgomery Police Department. He later saw the appellant at a bank, where he

was apparently working another job as a security guard in addition to working as a police officer. The appellant indicated to Stokes that he needed to make some money very quickly and asked if he knew how he could. They exchanged telephone numbers. Stokes subsequently did not call the appellant; the appellant called Stokes. Stokes subsequently contacted that Alabama Department of Public Safety with this information and a "reverse" sting operation was planned.

On May 8, 1991, Norman Willingham, a narcotics agent with the Alabama Department of Public Safety, met the appellant at aa bank in Montgomery. Shane Stokes handed some money to Willingham to purchase marijuana in Mobile. The appellant got in Willingham's car and they left for Mobile. On the way to Mobile, the appellant asked what they were going to pick up. Willingham told him that they were going to pick up marijuana. In Mobile, they met John Pigot, an agent with the United States

Drug Enforcement Agency (DEA). Willingham gave Pigot the money that Stokes had given him and put a bale of marijuana in the trunk of his car. On the return trip to Montgomery, the appellant asked how much marijuana they had purchased, and Willingham replied that it was forty pounds. The appellant was paid $250 for this trip.

On May 17, 1991, Willingham met the appellant at the same bank. On this trip, they were taking approximately 100 pounds of marijuana to Birmingham. Willingham intentionally left some of the marijuana in view in the hatchback of the car so the appellant would see it. The appellant told Willingham that he saw some marijuana bricks sticking out of the duffel bags. Willingham told the appellant to conceal the marijuana better, and he complied. On the trip to Birmingham, the appellant made a statement to the effect that if they were caught in possession of marijuana, he could be

imprisoned for 20 years. In Birmingham, they delivered the marijuana into Batson's car. The appellant was paid $250 for his participation and they returned to Montgomery.

On May 30, 1991, Willingham again met the appellant at a bank. On this trip to Birmingham, they were to deliver 140 pounds of marijuana and 1 pound of cocaine. Again they delivered the drugs to Birmingham, and the appellant loaded them into another vehicle. They returned to Montgomery. The appellant was paid $500 for this trip.

In each case, the evidence showed that the appellant knew the purpose of the trip. The evidence also shows that the appellant either handled or saw the drugs each time and was aware of the quantity. According to the state's witnesses, the appellant never indicated that he no longer wanted to participate in these drug deliveries.

When reviewing the denial of a motion for judgment of acquittal, we view the evidence in

a light most favorable to the state. See Colvette v. State, 568 So.2d 319, 321 (Ala. Cr. App. 1990). At trial, the state was attempting to prove that the appellant had constructive possession of the marijuana and the cocaine.

> "To establish possession, the State must prove: 1) actual or potential control, 2) intention to exercise dominion, and 3) and external manifestation of intent and control. Eady v. State, 495 So.2d 1161 (Ala. Cr. App. 1986). 'Where constructive possession is relied on the State must also prove beyond a reasonable doubt that the accused knew of the presence of the prohibited substance.' Temple v. State, 366 So.2d 740, 741 (Ala. Cr. App. 1978)."

Germany v. State, 600 So.2d 428, 429 (Ala. Cr. App.), cert. denied, 600 So.2d 432 (Ala. 1992).

> "'[T]he kinds of circumstances which may provide a connection between a defendant and [illegal drugs] are unlimited and will naturally depend on the facts of each particular case.' Temple v. State, 366 So.2d 740, 743 (Ala. Cr. App. 1978). Similarly, a defendant's knowledge of the presence of illegal drugs can be proved by circumstantial evidence, Self v. State, 564 So.2d 1023, 1027 (Ala.Cr. App. 1989), cert. quashed, 564 So.2d 1035 (Ala. 1990), which may include 'evidence

> of acts, or conduct of the accused, from which it may be fairly inferred that he knew of the existence of the contraband at the place where it was found,' Donahoo v. State, 505 So.2d [1067,] 1070 [(Ala. Cr. App. 1986).] (citations omitted)."

Pettaway v. State, [Ms. 91-318, July 24, 1992] ____ So.2d ____, ____ (Ala. Cr. App. 1992). See also Germany, 600 So.2d at 429.

In his brief, the appellant concedes that the state proved that he knew that he was transporting controlled substances. He contends, however, that the state failed to prove that he exercised actual or potential physical control over the drugs or that he intended to do so. He further contends that because the drugs belonged to the law enforcement authorities and were exclusively in the possession of the law enforcement officers (he was never alone with the drugs), the state did not prove control or intent to control.

The appellant, however, was in joint possession and control with Willingham during

each trip, and his intent to exercise control may be inferred from his willingness to make deliveries, his solicitation of the drug courier work, and his actual participation of the deliveries. Cf. Nobles v. States, 568 So.2d 318 (Ala. Cr. App. 1990)(wherein this court found that sufficient evidence to sustain a trafficking convictions based on constructive possession by a passenger who agreed to ride with an accomplice for the purpose of delivering marijuana). Thus, this issue is without merit.

V

The appellant argues that, the trial court erred by denying his motion for a judgement of acquittal or, in the alternative for a new trial, because he says he establish that the law enforcement officer's conduct was so outrageous, as a matter of law, as to amount to a denial of due process.

> "'To be so "outrageous" as to effect a denial of due process, government enforcement techniques must be

> "fundamentally unfair" or "shocking to the universal sense of conscience," United States v. Russell, 411 U.S. 423, 432 ... (1973); United States v. Mulherin, 710 F.2d 731 (11th Cir. 1983.' United States v. Mulherin, 765 F.2d 1491, at 1498 n. 4 (11th Cir. 1985). In Andrews, an undercover agent illegally transferred foodstamps through several dealings, which he recorded. The Court held that '[t]he circumstances of this case surely fail to meet this stringent standard [of "outrageous" governmental conduct.]' Ibid. at 1498 n. 4. Governmental conduct wherein the informants 'may have suggested the scheme and aided in arranging in the air transportation' was found not to constitute misconduct. United States v. Gray, 626 F.2d 494, 498 (5th Cir. 1980)."

Wright v. State, 494 So.2d 936, 939 (Ala. Cr. App. 1986). The appellant has cited no authority, and we have found none, indicating a successful appeal of the "outrageous governmental conduct" argument in Alabama. Furthermore, while the United States Supreme Court has neither endorsed nor completely foreclosed such a defense, see United States v. Russell, 411 U.S. 423, 432 (1973); Hampton v. United States, 425 U.S. 484 (1976), that Court has chosen to base its decisions on

entrapment instead. See Russell.

The appellant has simply not shown that the conduct of the law enforcement officers in the instant cases was "fundamentally unfair" or shocking to the universal sense of conscience." The evidence supports a finding that the appellant repeatedly solicited drug courier work from Shane Stokes. The law enforcement authorities involved merely provided the vehicle by which he could commit the offenses that he had indicated that he was predisposed to commit. Thus, this issue is without merit.

VI

The appellant argues that the trial court erred by denying his motion for a judgment of acquittal or a new trial because, he argues, the state failed to prove a prima facie case of a violation of [section] 36-25-5(a), Code of Alabama 1975. Section 36-25-5(a) reads as follows: "No public official or employee shall use an official position or office to

obtain direct personal financial gain for himself, or his family, or any business with which he or a member of his family is associated unless such use and gain are specifically authorized by law." Id.

The appellant contends that his role in these deliveries was to ride "shotgun," and if the vehicle in which he was riding was stopped by law enforcement authorities, he would get out of the car show his badge to discourage further interest in the vehicle. He further contends that because the vehicle was not stopped and he did not have to use his badge, he did not use his public office for personal gain.

In the instant case, the appellant was paid to ride "shotgun" because he was a police officer, not merely to use his badge. Furthermore, he was paid for each trip, regardless of whether he was called upon to use his badge. The appellant contends that he was not paid for riding along on the trips

because he was a police officer. We do not find the contention persuasive. Thus, this issue is without merit.

Based upon the foregoing the judgment of the circuit court is affirmed.

AFFIRMED.

ALL THE JUDGES CONCUR.*

*Entered November 18, 1992.

Appendix C

COURT OF CRIMINAL APPEALS

STATE OF ALABAMA
JUDICIAL BUILDING, 445 DEXTER AVENUE
MONTGOMERY 36130-1555

WILLIAM M. BOWEN, JR.
Presiding Judge
SAM TAYLOR
JOHN PATTERSON
H. WARD McMILLIAN
MARK G. MONTIEL
Judges

Clerk' Office
(205)-242-4590

Court of Criminal Appeals No. 91-371
(Montgomery Circuit Court No.
9101582,1583,1584,1585,1586)

Richard Patrick Long vs. **State of Alabama**
Appellant Appellee

Dear Sir of Madam:

You are hereby notified that on January 22, 1993, the following action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing **overruled**. Rule 39(k) motion **denied**.

LANE MANN
CLERK
COURT OF
CRIMINAL APPEALS